

**BOARD OF APPEALS
for
MONTGOMERY COUNTY
(240) 777-6600**

Case No. S-2591

PETITION OF YOUNG JOON LEE

OPINION OF THE BOARD
(Effective Date of Opinion: June 21, 2004)

Case No. S-2591 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. Pursuant to the provisions of Section 59-A-4.125 of the Montgomery County Zoning Ordinance, the Board of Appeals referred the Case to the Hearing Examiner to conduct a public hearing and issue a report and recommendation to the Board for final action. The Hearing Examiner convened a public hearing on January 23, 2004, which was continued to May 17, 2004, at the Petitioner's request. On May 27, 2004, the Hearing Examiner issued a report and recommendation for approval of the special exception.

The subject property is Lot 10, Block 19; located at 3000 Castleleigh Road, Silver Spring, Maryland, 20904.

Decision of the Board: Special Exception **granted**, subject
to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's report and recommendation at its Worksession on June 9, 2004. After careful consideration and review of the record the Board adopts the report and recommendation and grants the special exception subject to the following conditions:

1. The Petitioner is bound by Petitioner's testimony, representations and exhibits of record;
2. The Petitioner is bound by the condition set out in the Memorandum of Cece Kinna, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 19), that Petitioner will house no more than two unrelated persons or a family not exceeding four persons in the accessory apartment;
3. The Petitioner must make at least one space on his driveways available at all times for use by the tenant of the accessory apartment;
4. The Petitioner must either remove his garden shed or move it to a location in his back yard which meets the 5 foot side and rear setback requirements for an accessory building in the R-90 Zone;
5. Petitioner must occupy one of the dwelling units on the lot on which the accessory

apartment is located; and

6. Petitioner must not receive compensation for the occupancy of more than one dwelling unit.

On a motion by Allison Ishihara Fultz, seconded by Donna L. Barron, with Angelo M. Caputo and Donald H. Spence, Jr., Chairman in agreement and Louise L. Mayer necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 21st day of June, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
YOUNG JOON LEE,
Petitioner

Young Joon Lee
For the Petition
(With Thomas Lee¹ and Soon Chang
Assisting and Translating)

Cece Kinna
Department of Housing and
Community Affairs

Bernadine Karns, President
Calverton Citizens Association
Neither for nor Against

Board of Appeals Case No. S-2591
(OZAH Referral No. 04-20)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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¹ The Hearing examiner believes that the individual identified as Thomas Lee is the same person who was identified as "Chang Lee" in the January 23, 2004 transcript.

I. STATEMENT OF THE CASE

Petition No. S-2591, filed on August 29, 2003, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 3000 Castleleigh Road, Silver Spring, Maryland 20904. The subject property is designated Lot 10, Block 19, in the subdivision known as Plat Three, Part of Blocks 15,16,17,18, 19 & 20, Calverton, and it is zoned R-90. (Tax Account No. 05-00360848).

On October 21, 2003, the Board of Appeals issued a notice that a hearing in this matter would be held on January 23, 2004, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building. On October 15, 2003, the Board of Appeals adopted a resolution referring this case to the Hearing Examiner for Montgomery County to conduct a public hearing and issue a written report and recommendation to the Board of Appeals for final action.

The Department of Housing and Community Affairs inspected the property on December 30, 2003, and found problems with both driveways on the subject property, as set forth in a memorandum dated January 2, 2004 (Exhibit 13). On January 19, 2004, Bernadine Karns, President of the Calverton Citizens Association, wrote to the Hearing Examiner asking that he “really look at this application.” (Exhibit 14) Ms. Karns expressed concerns about the notice sign being posted “in the bushes” and the fact that there was a recent large addition to the house. Her letter also alleged that there were already other people living in the house. Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC) noted that there was a family of three already living in the accessory apartment (Exhibit 15); however, Petitioner testified at the hearing that he had no boarders other than the occupants of the accessory apartment, and Ms. Karns did not offer any testimony on this issue at the hearing.²

² Ms. Karns appeared at the brief January 23, 2004 hearing, but did not appear for the main body of the hearing which took place on May 17, 2004.

Technical Staff, in a report issued January 20, 2004,³ recommended deferral of the hearing until Petitioner corrected some deficiencies and produced documentation evidencing compliance with the statute (Exhibit 15).⁴

A public hearing was convened as scheduled on January 23, 2004, and Petitioner Young Joon Lee appeared *pro se*, but with the lay assistance of Mr. Chang Lee in support of the petition. Also attending were Ms. Cece Kinna, Housing Code Inspector of the Department of Housing and Community Affairs, Ms. Barbara Foresti, also of the Housing Department, and Ms. Bernadine Karns, President of the Calverton Citizens Association.

After taking some evidence with regard to the posting of the notice sign, the hearing was adjourned, with Petitioner's consent, until May 17, 2004, to give Petitioner the opportunity to make needed improvements to his driveways and to provide required documentation to Technical Staff. On May 13, 2004, Technical Staff filed a supplemental report recommending approval of the special exception, with conditions (Exhibit 18). On the morning of the hearing, May 17, 2004, Cece Kinna filed a supplemental report (Exhibit 19) indicating that re-inspection of the premises on May 13, 2004, revealed compliance with legal requirements for the improvements made by Petitioner to his driveways.

The hearing resumed as scheduled on May 17, 2004, and testimony was received from Petitioner, with the lay assistance of Messrs. Soon Chang and Thomas Lee. Petitioner also executed the affidavit of posting (Exhibit 29), introduced a number of other exhibits and agreed to meet all the conditions set forth in the supplemental Technical Staff Report (Exhibit 18). The record closed upon the completion of the hearing on May 17, 2004. It was reopened briefly on May 25, 2004, to receive Transportation Planning Staff's Report of November 13, 2003 (Exhibit 30) into the record.

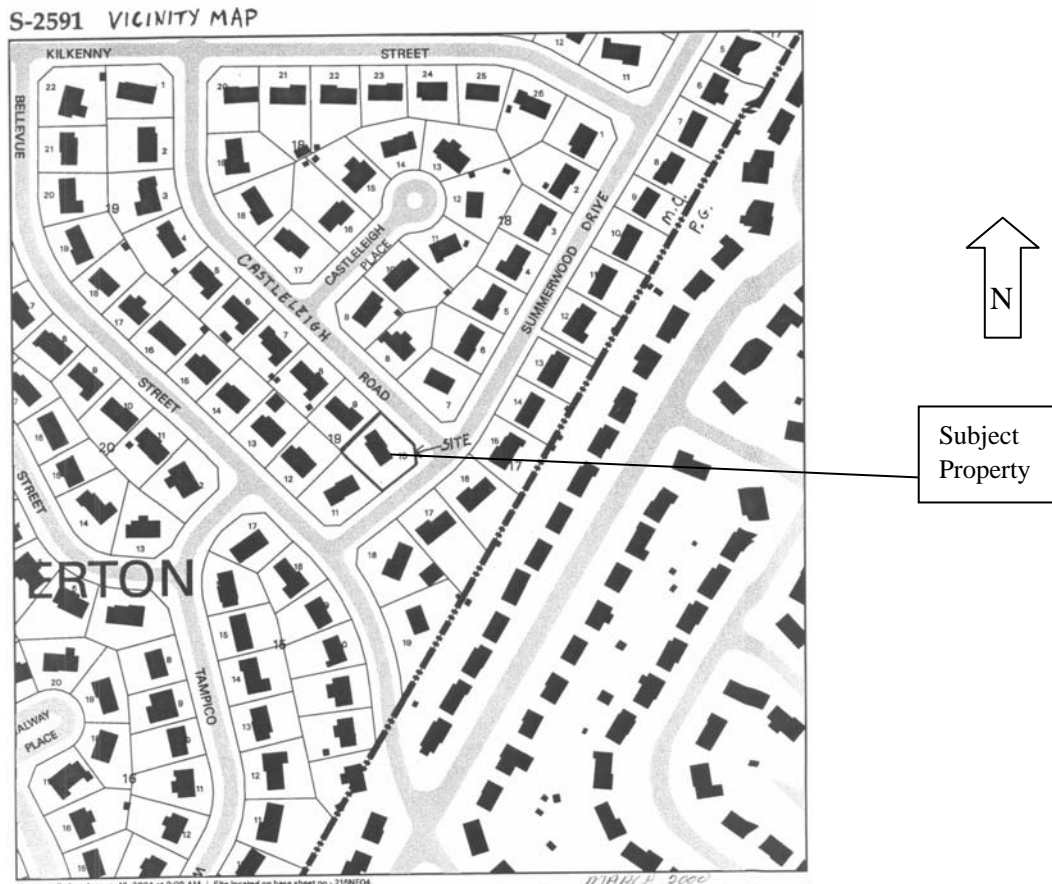
³ The report was dated January 20, 2003, in error.

⁴ Technical Staff reports are frequently quoted and paraphrased herein.

II. FACTUAL BACKGROUND

A. The Subject Property

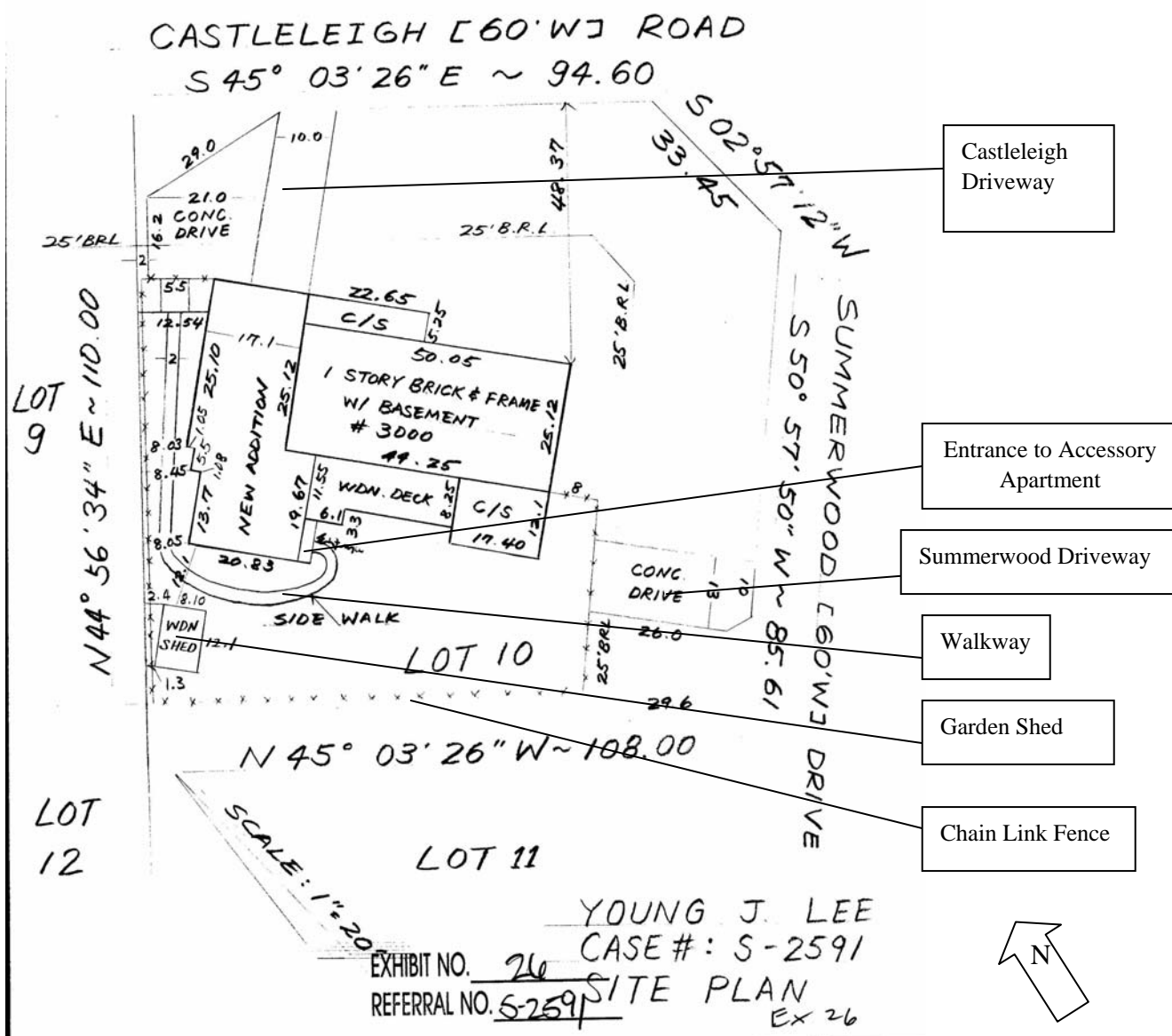
As noted above, the subject property is located at 3000 Castleleigh Road, Silver Spring, Maryland 20904, and is designated Lot 10, Block 19, in the subdivision known as Plat Three, Part of Blocks 15,16,17,18, 19 & 20, Calverton. It is zoned R-90. The residence in question is located on the southwest corner of the intersection of Castleleigh Road and Summerwood Drive, a short distance from Bellevue Street. Its location is depicted in the Vicinity Map attached to Technical Staff's initial report.



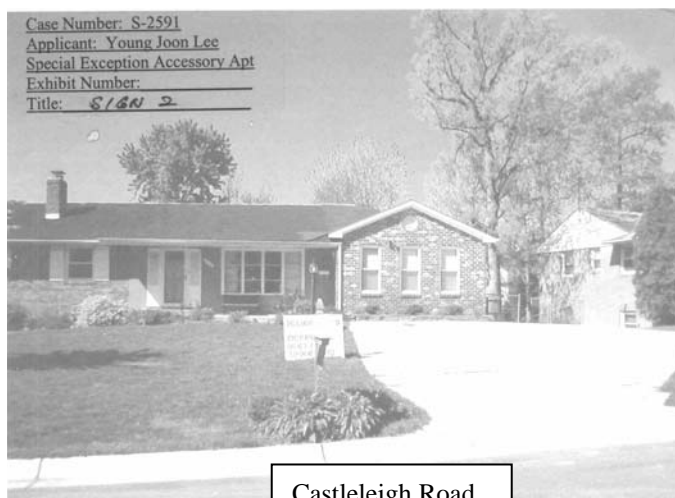
According to the Technical Staff, Lot 10, Block 19 is approximately 12,207 square feet and slopes to the rear. The lot has a street frontage of approximately 94.6 feet along Castleleigh Road and 85.61 feet along Summerwood Drive. The subdivision plat was recorded on January 4,

1965 in Plat Book 77, Plat No. 7642, M-NCPPC No. 190-79, and the house was built in 1966.

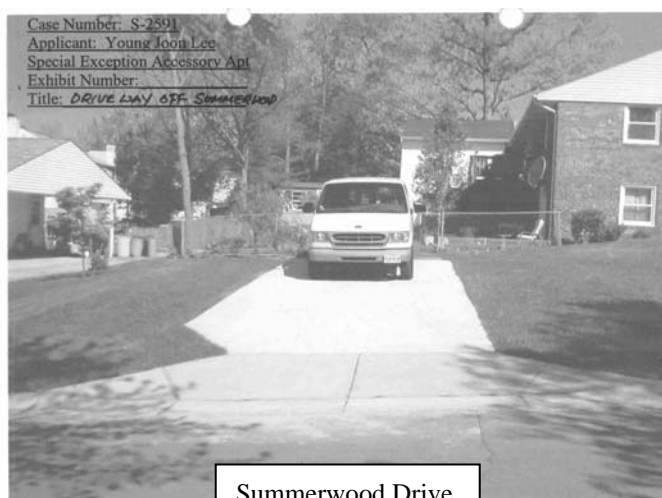
Petitioner's home is a single story brick house, with a large addition on the northwest side of the structure. There is a fenced-in rear yard with a deck and patio, and there are two driveways, one feeding Castleleigh Road and the other Summerwood Drive. These features are shown in the revised Site Plan admitted as Exhibit 26 and shown below.



Both driveways were improved by Petitioner at the direction of the Housing Department and the M-NCPPC Technical Staff, while his special exception petition was pending. The concrete surface of the Castleleigh driveway was widened, and the Summerwood driveway was converted from gravel to concrete, following receipt of an appropriate permit from Department of Permitting Services (DPS). Exhibit 27. Pictures of the subject property were introduced by Petitioner at the hearing. The two shown below depict the home and the two improved driveways, the left (Exhibit 20(b)) from Castleleigh Road, and the other (Exhibit 21(a)) from Summerwood Drive.



Castleleigh Road



Summerwood Drive

As is evident from the pictures, the two driveways can accommodate numerous cars, estimated by Petitioner to be six or more. 5/17/04 Tr. 28. In addition, Technical Staff notes that three cars can be parked along the property's Castleleigh Road frontage, and two can be parked along the Summerwood frontage. The main part of the house is occupied by Petitioner, his wife and daughter. The accessory apartment is occupied by a parent and two grown children, according to the Technical Staff report.

There is a garden shed in the back yard which, as noted by Technical Staff, does not comply with five foot back and side yard setback provisions for accessory structures in the R-90 Zone. Petitioner agreed at the hearing to a condition to either remove the shed or move it to

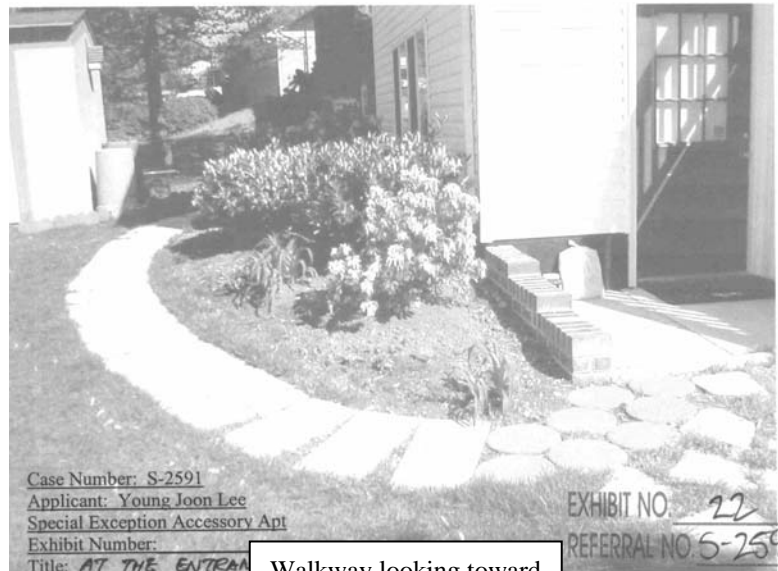
comply with the setback provisions. The detail on the revised Site Plan and other documentation provided by Petitioner satisfied Technical Staff that Petitioner was in compliance with all other setback and zoning requirements (Exhibit 18, Technical Staff's supplemental report of May 13, 2004). The supplemental Housing Code Inspector's report also found no remaining violations (Exhibit 19).

B. The Proposed Use

The proposed accessory apartment is located in the basement of the house and has a separate entrance at the rear of the home. It is approached by a walkway which was extended at the direction of Technical Staff. The walkway and the door to the accessory apartment are depicted below in Exhibits 22(a) and (b).



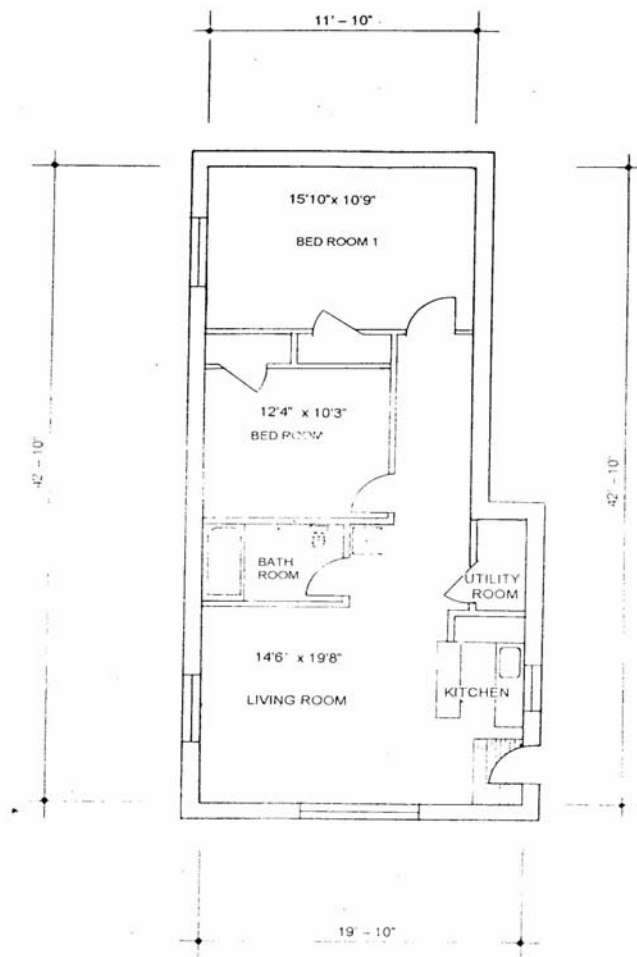
Walkway looking toward
Summerwood Drive



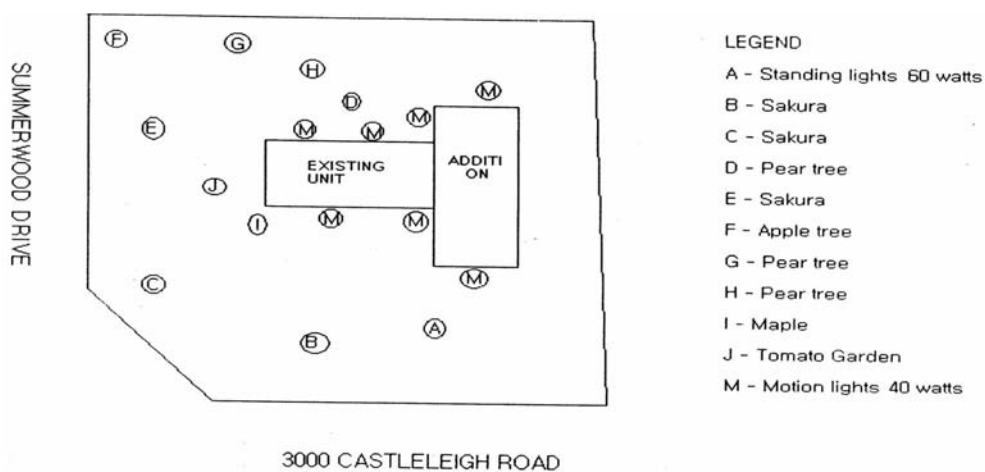
Walkway looking toward
door to Accessory Apt.

The accessory apartment contains a living room, a kitchen, a bathroom, a utility room and two bedrooms, all of which occupy about 680 square feet, according to Petitioner. Technical Staff measured the floor space as 716 square feet.⁵ Copies of the accessory apartment Floor Plan (Exhibit 5) and the Landscape and Lighting Plan (Exhibit 6) are shown below:

⁵ The Housing Code Inspector measured 520 square feet of "habitable area." (Exhibit 19)



EXISTING BASEMENT FLOOR PLAN
 SCALE 1/8" = 1'-0"
 APARTMENT (680 SQ.)



LANDSCAPE & LIGHTING PLAN

Technical Staff found that both the Floor Plan and the Landscape and Lighting Plan are sufficient, and the Hearing Examiner agrees.

C. The Notice Sign Posting Issue

As noted above, an issue was raised in this case about the posting of the notice sign. Mrs. Karns, President of the Calverton Citizens Association, wrote and testified about the notice sign “laying on the bushes.” 1/23/04 Tr. 15. Moreover, Petitioner removed the sign on January 5, 2004, because he mistakenly believed that the hearing was set for that date and it was therefore okay to take the sign down. The date confusion resulted from comments made to him by the Housing Inspector, Cece Kinna, who also thought the original hearing date was January 5, 2004. She testified that someone gave her the wrong date. 1/23/04 Tr. 10. As a result, Petitioner appeared for the hearing on January 5, only to be informed that the hearing was not until January 23.

The sign remained down until January 13, 2004, when Technical Staff visited the subject home and informed Petitioner that it had to be conspicuously posted. Petitioner signed an affidavit (Exhibit 29) to the effect that the sign has been continuously and conspicuously posted since that time. Mrs. Karns testified that when she drove by on January 23, 2004, the sign was “very visible.” 1/23/04 Tr. 15. The visibility of the sign is demonstrated by the following picture (Exhibit 20(a)):



It is undisputed that the sign has been posted in this fashion since January 13, 2004, and it therefore has been conspicuously posted for more than four months. Even though, technically speaking, it is not posted the required 2½ feet above the ground (Zoning Code §59-A.4.43(b)), the Hearing Examiner agrees with the Technical Staff that the sign is quite visible and finds that adequate notice has been given.

D. The Neighborhood and its Character

The neighborhood is residential in character and consists of mainly one family homes, on land zoned R-90. Technical Staff defined the neighborhood as “that area bounded by Fairland Road on the north, the border between Montgomery and Prince George’s Counties on the east, Galway Drive on the west, and Calverton Boulevard on the south.” The Hearing Examiner accepts that definition, and the defined neighborhood is depicted below on a map that was attached to the initial Technical Staff report.



The only special exception that existed in the area has been revoked, according to Technical Staff. It was a group day care center for 7 to 12 children, located at 13200 Bellevue Street(S-1300), which was granted on July 24, 1986 and revoked on January 14, 1992. The only reaction from the neighborhood to the instant petition has been the letter and January 23, 2004 testimony from Ms. Karns on behalf of the Calverton Citizens Association. Ms. Karns did not state in her letter that Calverton Citizens Association opposed the special exception, but rather that the application should be closely examined. Her only testimony dealt with the sign-posting questions mentioned above, and she was satisfied with the visibility of the sign following its re-posting on January 13, 2004.

E. The Master Plan

The property is located within the area covered by the *Fairland Master Plan*, approved and adopted in 1997. The *Master Plan* identifies the specific area as “Calverton,” which is discussed on pages 36 through 38 of the Plan. None of the recommendations in that discussion bear on the use of accessory apartments in the area. The *Master Plan* in general sets a goal of “maintaining a wide choice of housing types” and recommends “maximiz[ing] the percentage of single-family detached units in the developable areas” (p. 28). Moreover, because Petitioner plans no external structural modifications to the subject property and because there is sufficient parking to accommodate the proposed use, the requested special exception will maintain the residential character of the area. Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the applicable *Master Plan*.

In this connection, Technical Staff (Exhibit 13) also quoted a recent study by the M-NCPPC noting that:

[accessory apartments] can be an excellent solution to the shortage of affordable housing by producing extra income for homeowners, dispersing the supply of moderate-cost housing more uniformly throughout the community, contributing to the tax base, reducing sprawl by providing

more concentrated urban housing opportunities, and providing a means for extended family members to live together in a single site. (Housing Montgomery: A Menu of Options for a Dramatic Increase in the Supply of Housing for our Workforce, 3/6/03, Montgomery County Planning Board Agenda Item #1)

III. SUMMARY OF HEARING

At the January 23, 2004 hearing, testimony was heard from Petitioner, Young Joon Lee, assisted by Mr. Chang Lee, from Cece Kinna, Housing Code Inspector and from Bernadine Karns, President of the Calverton Citizens Association. Only Petitioner and his assistant, Mr. Thomas Lee, testified at the May 17, 2004 hearing, although Petitioner was also assisted by Mr. Soon Chang.

January 23, 2004 Hearing:

Mr. Lee testified that he took the notice sign down on January 5, 2004, because he mistakenly thought that the hearing was on January 5, 2004. Cece Kinna, testified that she also thought the original hearing date was January 5, 2004, and that someone had given her the wrong date. 1/23/04 Tr. 10. She therefore told Petitioner the wrong date, and as a result, Petitioner appeared for the hearing on January 5, only to be informed that the hearing was not until January 23.

Mrs. Karns, President of the Calverton Citizens Association, testified that the notice sign was not very visible where it was originally located because it was "laying on the bushes." 1/23/04 Tr. 15. However, Petitioner testified that, after Technical Staff visited, he reposted the sign conspicuously on January 13, 2004, where it has remained to date. 1/23/04 Tr. 11-14. Mrs. Karns confirmed the visibility of the sign as newly located by testifying that when she drove by on January 23, 2004, the sign was "very visible." 1/23/04 Tr. 15.

May 17, 2004 Hearing:

Petitioner introduced numerous documents including photographs of the home (Exhibits 20 through 25), a revised Site Plan (Exhibit 26), a copy of the permit to install the Summerwood

driveway (Exhibit 27) and a copy of his deed to the premises (Exhibit 28).

After some confusion about the date on which the notice sign was reposted in its conspicuous location, Petitioner indicated it was re-posted on January 13, 2004, and remains there still, as stated in his affidavit of posting (Exhibit 29). The Hearing Examiner reminded Petitioner that the sign must remain posted until 30 days after the Board issues its opinion.

In questioning by the Hearing Examiner, Mr. Lee testified as to his compliance with each of the general and specific standards for obtaining an accessory apartment special exception (5/17/04 Tr. 20-31).⁶ Specifically, there would be only one accessory apartment; the apartment would have at least one party wall in common with the main dwelling; the house is almost 25 years old; there is no family of unrelated persons on the premises; there are no rental uses on the premises other than the subject accessory apartment; there is a separate entrance for the accessory apartment that preserves the appearance of a single family home; there are no modifications planned to the external part of the house; the accessory apartment would have the same street address as the main dwelling; the accessory apartment would occupy around 716 square feet (*i.e.*, under 1200 sq ft); the owner, Mr. Lee, would occupy the main dwelling; more than a year has elapsed since the owner purchased the property;⁷ compensation will be received by Petitioner for only one dwelling unit; the lot, being 12,207 square feet, exceeds the 6,000 square foot minimum lot size; he doesn't know of other special exceptions in the area; there is ample off-street parking in his driveways;⁸ the accessory apartment use is consistent with the applicable Master Plan, as far as Petitioner knows; the accessory apartment will be in harmony with the general character of neighborhood; the accessory apartment would not be detrimental to the use, peaceful enjoyment, value or development of the surrounding properties; there would be no objectionable noise,

⁶ Mr. Thomas Lee, who was also sworn as a witness, provided some of the answers to these questions.

⁷ Petitioner introduced a quitclaim deed showing that the property was conveyed to Petitioner and his wife on August 7, 1997 (Exhibit 28).

⁸ The Hearing Examiner will recommend a condition that at least one off-street parking space be allocated to the accessory apartment tenant.

vibrations, fumes, odors, dust, illumination, glare or physical activity; the lighting is located in such a way as not to adversely affect the neighbors; the accessory apartment would not alter the residential nature of the area, nor would it adversely affect the health, safety, security, morals or general welfare of the residents, visitors or workers in the area; it would be served by adequate public facilities; and it would not reduce the safety of vehicular or pedestrian traffic.

Finally, Petitioner testified that he would comply with the conditions set forth by Technical Staff and the Housing Code Inspector's supplemental report (Exhibit 19). 5/17/04 Tr.18-19.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner had satisfied all the requirements to obtain the special exception, as long as he complies with the recommended conditions (Exhibit 18).

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Among the characteristics of accessory apartments listed by Technical Staff, are the following that may have adverse impacts: the existence of an additional household on the site,

additional activity, more use of the outdoor space, more pedestrian and vehicular traffic, more parking activity and the potential for additional noise. The undersigned concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two. That is the case here.

Despite Petitioner's limited understanding of English, he has studiously complied with all of the requirements of both the Technical Staff and the Housing Department, obtaining a permit to pave his Summerwood Driveway, actually paving it, widening the paved area on his Castleleigh Driveway, extending the walkway to the accessory apartment and producing all of the documentation required by Technical Staff. As noted at the beginning of this report, Bernadine Karns, President of the Calverton Citizens Association, did not oppose the petition, *per se*, but rather asked that the Hearing Examiner "really look at this application." (Exhibit 14). That has been done, beginning with the thorough examination given the subject property and the conditions established for Petitioner by both the Technical Staff and the Housing Department, and ending with the two hearings and this report.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, I conclude, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff reports, the Housing Code Inspector's reports, the numerous exhibits in this case and the testimony of the Petitioner and the other witnesses provide ample evidence that the

general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The 1997 Fairland Master Plan sets a goal of “maintaining a wide choice of housing types” and recommends “maximiz[ing] the percentage of single-family detached units in the developable areas” (p. 28). Thus, it is fair to say that the planned use, an accessory apartment in a single family detached

home, is not inconsistent with the applicable *Master Plan*. Moreover, the Technical Staff noted that the County Council is supportive of mechanisms to provide affordable housing in the County, and accessory apartments are one such mechanism. Thus, the Staff concludes, and I agree, that the proposed use is consistent with the *Master Plan* and the *General Plan* for development in the County.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because no structural change to the house is proposed. As to parking, Technical Staff determined in its supplemental report that the existing dwelling has room for at least four off-street parking spaces in its two driveways. Moreover, the Hearing Examiner will recommend requiring that at least one of those spaces be made available to the accessory apartment tenant. Thus, there should be no impact on the neighborhood as far as parking. The proposed use will not generate any significant change in traffic conditions.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence in the record to contradict Petitioner's testimony and the Technical Staff's conclusion that there will be no adverse effects on the neighborhood due to the accessory apartment; nor will it be detrimental to the

peaceful enjoyment, economic value or development of surrounding properties at the site. Therefore, the Hearing Examiner so finds.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the proposed use, the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Technical Staff found that the lighting was “typically residential” and of low wattage. After reviewing the Petitioner’s Landscape and Lighting Plan, Technical Staff concluded, and the Hearing Examiner agrees, that “both the landscaping and the lighting [are] sufficient and in accordance with all requirements.” Exhibit 18.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Since there are no other existing special exceptions in the defined neighborhood, the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of

residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities.

The Technical Staff notes in its initial Report (Exhibit 15) that “[t]he adequacy of public facilities for the one-family detached dwelling on the subject property was determined at the time of subdivision review.”

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of both the Local Area Transportation Review (“LATR”) and the Policy Area Transportation Review (“PATR”). The Technical Staff did do such a review, and it is contained in Transportation Planning Staff’s Memorandum of November 13, 2003 (Exhibit 30). The Transportation Staff concluded that the existing single-family dwelling generates one weekday morning peak hour trip and one weekday evening peak hour trip, and that the

proposed accessory apartment use would add one additional trip during those peak periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 50 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study (Exhibit 30). See the July 2002 LATR Guidelines, of which the Hearing Examiner takes official notice.

Turning to the PATR, the FY 2003 Annual Growth Policy (“AGP”) transportation staging ceilings show negative remaining capacity of 3,527 housing units in the Fairland/White Oak policy area as of September 30, 2003. However, because the requested Special Exception will generate fewer than five total weekday morning and evening peak-hour trips, its effect is considered *de minimis* under the AGP. Therefore, the Transportation Staff concludes, as does the Hearing Examiner, that the instant petition meets the PATR test, as well as the LATR test.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Transportation Staff Report (Exhibit 30), the Hearing Examiner finds that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Reports (Exhibits 15 and 18) provide sufficient evidence that the specific standards required by Section 59-G-2.00

are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of a recent addition to the main dwelling and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No addition or extension of the main dwelling is proposed beyond the already existing addition that houses the accessory apartment in its basement.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The original house was built in 1966 (Exhibit 15). It therefore meets the “5 year old” requirement.

(5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use does not violate any of the provisions of this subsection.

(6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment is through a rear door to the basement.

There will be no change to the residential appearance of the dwelling.

(7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No additional external modifications are proposed. Petitioner has already paved his Summerwood Driveway, widened the paved area on his Castleleigh Driveway and extended the walkway to the accessory apartment in accord with Technical Staff requirements. All of these changes are compatible.

(8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: The accessory apartment is clearly subordinate to the main dwelling, as it occupies approximately 716 square feet in the basement of the addition to Petitioner’s home.

59-G § 2.00(b) Ownership Requirements

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner lives in the main dwelling and plans to continue living there.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner acquired the property in 1997 according to the deed (Exhibit 28), easily more than one year before the filing of the petition.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioner will receive compensation for only one dwelling unit.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioner and his wife are the owners of the property.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable

59-G § 2.00(c) Land Use Requirements

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot*

coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject lot is approximately 12,207 square feet in size. The following chart from page 6 of the May 13, 2004, Supplemental Technical Staff Report (Exhibit 18) demonstrates compliance with all development standards:

Development Standard – R-90/Acc. Apt.	Required/ Allowed	Provided	Compliance
Maximum Building Height:	2.5 stories or 35 feet	1 story	Yes
Minimum Lot Area:	9000 s.f.	12,207 s.f.	Yes
Minimum Width at Front Building Line:	75 feet	110 feet	Yes
Minimum Width at Proposed Street Line:	25 feet	94.6 feet	Yes
Minimum Front Yard Setback:	30 feet	38 feet and 34 feet (two front yards in corner lot)	Yes
Minimum Side Yard Setback:	8 feet one side, sum of 25 feet both sides	8.05 feet	Yes
Minimum Rear Yard Setback:	20 feet	25 feet	Yes
Maximum Building Coverage:	30%	< 30 %	Yes
Maximum Floor Area for Accessory Apartment	1200 s.f.	716 s.f. approx., per staff measurements from submitted floor plan	Yes

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: There are no other special exceptions in the neighborhood, and therefore this special exception, if granted, will not result in an excessive concentration of similar uses in the general neighborhood.

(3) *Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*

- (i) *More spaces are required to supplement on-street parking; or*
- (ii) *Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: There are at least four off-street parking spaces in Petitioner's driveways.

Thus, there is sufficient on-site parking to accommodate the proposed use.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. In this case, the Housing Code Inspector's supplemental report (Exhibit 19) notes that Petitioner has corrected the previously noted problems with driveways and specifies that the proposed accessory apartment, having 520 square feet of habitable space, is limited to two unrelated persons or a family not to exceed four persons. As noted, Petitioner has agreed to meet this condition.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2591 for a special exception for an accessory apartment located at 3000 Castleleigh Road, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by Petitioner's testimony, representations and exhibits of record;

2. The Petitioner is bound by the condition set out in the Memorandum of Cece Kinna, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 19), that

Petitioner will house no more than two unrelated persons or a family not exceeding four persons in the accessory apartment;

3. The Petitioner must make at least one space on his driveways available at all times for use by the tenant of the accessory apartment;

4. The Petitioner must either remove his garden shed or move it to a location in his back yard which meets the 5 foot side and rear setback requirements for an accessory building in the R-90 Zone;

5. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located; and

6. Petitioner must not receive compensation for the occupancy of more than one dwelling unit.

Dated: May 27, 2004

Respectfully submitted,

Martin L. Grossman
Hearing Examiner